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The Symmetry of Preclusion

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> Were it not for [the] full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries. That clause compels that controversies be stilled, so that, where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states . . . as it does in the state where rendered. [T]he local doctrines of res judicata, speaking generally, become part of national jurisprudence . . . .[1]

I. INTRODUCTION

The complexities of modern litigation lend a heightened significance to the doctrine of res judicata.[2] It has become commonplace that the events generating

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[1] Riley v. New York Trust Co., 315 U.S. 343, 348–49 (1942) (citations omitted).

[2] Res judicata, in the broadest sense, consists of two discrete kinds of preclusion. Claim preclusion, also called "merger and bar," is triggered when a judgment is entered. The claim of a prevailing plaintiff is merged into the judgment. If the defendant prevails, the plaintiff is thereafter barred from subsequent suits on the same claim. In essence, both merger and bar extinguish the plaintiff's claim. The term "claim preclusion" includes both merger and bar, and is the more recent terminology. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). Generally speaking, the modern view is that claim preclusion (merger and bar) embraces all grounds of recovery that were asserted in the suit as well as those which could have been asserted.

Issue preclusion or, to use the older terminology, collateral estoppel, can be implicated when one or more of the parties to an earlier suit are involved in subsequent litigation on a

litigation implicate many potential parties, raising the likelihood of successive suits in different courts. In addition, the sheer number of claims pursued in federal and state courts increases the probability that a lawsuit in one jurisdiction will have intersecting features with that in another. It is not surprising that the law of intersystem preclusion is receiving wide attention.[3]

Even in a single jurisdiction, the doctrine of res judicata can generate formidable difficulties;[4] in a system of federalism, these problems are compounded. A court of one sovereign often renders a judgment, the effect of which is determined by a court of another jurisdiction. A critical issue that continues to generate debate is whether the latter sovereign should have considerable freedom to define the consequences of the prior judgment. In a leading article published in 1976, Professor Ronan Degnan suggested a restrictive approach.[5] He concluded that the emerging rule was that "claims and issues precluded by [a valid] judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment."[6] In the course of this Article, I shall determine whether the "emerging" rule has matured in the form Professor Degnan predicted. More importantly, I propose to assess from a fresh perspective the considerations that should play a major

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different claim. It sometimes occurs, of course, that issues determined in the prior litigation arise in the later suit. Basically, if the common issue was actually decided and necessary to the judgment in the earlier suit, its relitigation will be precluded on motion of the party who seeks to foreclose the issue. The party bound by the earlier determination has already had "his day in court."

Claim preclusion and issue preclusion are often collectively referred to as "res judicata," and this usage is generally adopted in this Article. There are many fine expositions of res judicata. A helpful introduction is found in JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 606-96 (1985).

[3] *See, e.g.*, Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Sanford N. Caust-Ellenbogen, *False Conflicts and Interstate Preclusion: Moving Beyond A Wooden Reading of the Full Faith and Credit Statute*, 58 FORDHAM L. REV. 593 (1990); Jean A. Mortland, *Interstate Federalism: Effect of Full Faith and Credit to Judgments*, 16 U. DAYTON L. REV. 47 (1990); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209 (1986). A comprehensive and insightful treatment of the effects of judgments is found in 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE (1981).

[4] *See, e.g.*, Sutcliffe Storage & Warehouse Co. v. United States, 162 F.2d 849 (1st Cir. 1947) (dealing with the problem of multiple similar leases on same premises and raising issue whether multiple suits permitted); Cambria v. Jeffery, 29 N.E.2d 555 (Mass. 1940) (posing question whether findings in first suit of defendant's negligence and plaintiff's contributory negligence were issue preclusive with respect to defendant's conduct).

[5] Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

[6] *Id.* at 773.

role in shaping the prevailing doctrines. What seems to me to be neglected in the literature is a careful examination of how res judicata rules animate the strategies of litigants and, in turn, how these strategies affect the allocation of public and private resources devoted to judicial dispute resolution. Examination of this phenomenon provides one of the bases for the theme of symmetry that emerges as the discussion progresses.

This Article proceeds, then, as follows. I first briefly examine the Supreme Court's modern interpretations of the full faith and credit statute, noting the several important factual patterns presented by the cases. The crucial question is whether the restrictive holdings of these cases should be extended to require a high degree of conformity to the judgment court's law, or whether the Supreme Court should relax its approach and provide at least a modicum of flexibility to the second forum. I conclude that the Court's general approach is supported by both practical and policy considerations. Thus, I offer the first part of a major thesis: the Court's demand for symmetry should be controlling in most cases to which the full faith and credit statute applies.

I next turn to the second major issue: what "faith and credit" must be accorded *federal* judgments by state courts and other federal courts? Here the full faith and credit statute is inapplicable. I nonetheless urge that the process of determining the effects of federal judgments in other courts should essentially parallel the process of determining the effects of state judgments under the statute. In the elaboration of this part of the thesis, I face the familiar *Erie* problem that arises when a federal court enters a judgment based upon state law as, for example, in a diversity case. A close question is raised as to whether the effect of the federal judgment should be determined by federal law or by the state law applicable in the jurisdiction in which the federal trial was held. I conclude that the strong policies that generally uphold a rendering court's authority to determine the effect of its judgment justify the exercise of this authority by a diversity court.

II. THE FULL FAITH AND CREDIT STATUTE

The familiar starting point for any discussion of interstate issue preclusion is Article IV of the Constitution of the United States. For present purposes, its command may be simply put: "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State."[7] An accompanying constitutional provision gives Congress the authority to "prescribe the Manner

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[7] U.S. CONST. art. IV, § 1.

in which such . . . Proceedings shall be proved, and the Effect thereof."[8] At an early date,[9] Congress passed an implementing statute that appears today largely unchanged as 28 U.S.C. § 1738. This full faith and credit statute provides in part that "records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law and usage in the courts of such State, Territory or Possession from which they are taken."[10]

On its face, the statute reveals a unifying purpose: the judgment of a state court, f-1, shall have the same effect in any court "within the United States," f-2, as it has in the courts of the rendering sovereign. The statutory edict, essentially an intersystem choice of law provision, seems simple enough. The referent for all courts considering the effect of an earlier state court judgment is the law governing judgments in the rendering jurisdiction. All other courts, state and federal, are to be guided by the rules and doctrines that would be applicable to a successive internal suit on the initial judgment.

Yet, beneath this straightforward approach lie many difficulties. There are, of course, multiple dimensions to the law of judgments ranging from the core of judgment recognition (*e.g.*, f-2's recognition and enforcement of f-1's valid money judgment) to the various features of claim and issue preclusion. The focus here is on the latter area, for that is where most problems arise. Accordingly, the terms "law of judgments" and "res judicata" are ordinarily used interchangeably herein to denote claim and issue preclusion or, in the older terminology, merger, bar, and collateral estoppel.[11]

The full faith and credit statute has been construed as applying to preclusion, and the thrust of its language appears to compel adherence to the res judicata law of the judgment state. Nonetheless, important questions surround the degree to which other courts must conform to the various features of the rendering state's law of judgments. Does the federal statute command conformity to all the subsidiary rules and incidental features of f-1's law of

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[8] *Id.*

[9] The full faith and credit statute was enacted in 1790. Its original language required that a state judgment be given "such faith and credit" as it had "by law and usage in the [rendering] state." Act of May 26, 1790, ch. 11, 2 Stat. 122. *See* 18 WRIGHT ET AL., *supra* note 3, at 627.

[10] 28 U.S.C. § 1738 (1988). Note that the current version of the statute differs slightly from its predecessor, *see supra* note 9, in that it calls for the "same full faith and credit."

[11] *See supra* note 2.

claim and issue preclusion,[12] or, does it allow f-2 some discretion—quite typical in choice of law generally—to apply its own res judicata rules?

In its recent interpretations of the full faith and credit statute, the Supreme Court appears to have left very little room for the exercise of discretion by f-2. At times, the Court speaks as if it feels unduly confined by the "plain language" of Section 1738. This sense of resignation stems from concern that the conformity mandated by the statute may not always take adequate account of the multiple values and policies that appropriately refine the law of res judicata. Although the Court, collectively at least, does not appear to disagree with the general approach of the statute, some of the justices have reservations concerning the wisdom of requiring a high degree of conformity between f-1 and f-2.[13] Indeed, there remains a current of opinion among leading commentators that the Court has not yet completely closed the door to f-2's independence.[14]

III. STATUTORY CONFORMITY

The precise term of Section 1738 provides that both federal and state courts accord to the judgment of a state court the "same full faith and credit" that the rendering state would give it.[15] By obliging other domestic courts to apply the law of judgments applicable in the rendering state, Congress has facilitated a uniform approach to intersystem preclusion. Alternatively, Congress could prescribe a single federal standard to govern the intersystem effect of judgments. Since it has not done so, however,[16] the adoption of the law of the judgment state seems a natural, if not inevitable, means of advancing

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[12] "[C]ompelling arguments . . . can be made for limiting full faith and credit to the rules that support the core values of finality, repose, and reliance, as well as some of the rules that facilitate control by the first court over its own procedure." 18 WRIGHT ET AL., *supra* note 3, at 636. "[T]here are many situations in which the res judicata effects of a state court judgment are properly controlled by the domestic rules of a second state." *Id.* at 625.

[13] *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 88 (1984) (White, J., concurring).

[14] *See, e.g.*, EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 954 (2d ed. 1992); LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 704–05 (1991); 18 WRIGHT ET AL., *supra* note 3, at 426–28 (Supp. 1992).

[15] *See supra* notes 9–10 and accompanying text.

[16] For a legislative provision dealing with res judicata in the specific context of the Clayton Act, see 15 U.S.C. § 16 (1988); *cf.* 28 U.S.C. § 2676 (1988) (judgment previously rendered in an action against the U.S. government bars any subsequent action by claimant against an employee of the government arising out of the same subject matter).

uniformity. Without some common referent, each enforcing court would be free to take its own view of the appropriate "faith and credit" to be given a state court judgment. At the extreme, of course, such freedom would be intolerable. A successful plaintiff who held a money judgment rendered by one state, for example, would have no assurance that it could be enforced in another state, particularly if the judgment rested on a claim that was not recognized by the second forum.[17]

On the other hand, as to those aspects of judgment enforcement that are less central to the bonding of the Union, it has often been suggested that it is unwise to compel f-2 to comply strictly with f-1's laws.[18] As noted previously, most of these subsidiary consequences of a judgment are found in the various rules governing res judicata. In some contexts, forceful arguments appear to support f-2's independence. For example, the case for the application of f-2's law of judgments seems particularly strong when it wishes to accord a greater issue preclusive effect to the prior judgment than f-1's rules would permit. For example, suppose f-2 would bind a litigant who participated in both the first and second suit to a determination made in the earlier suit, even though f-1 would not. In this setting, the judgment of the rendering court would be recognized as valid by the second forum. The recognizing court would simply be expanding the issue preclusive effect to the f-1 judgment, presumably because it was disinclined to expend its resources to litigate anew a question already resolved.

Even some aspects of claim preclusion should arguably fall outside the principle of conformity. Suppose, for example, there were reason to conclude that Congress had entitled claimants with a specified federal cause of action, such as a claim for antitrust violations, to at least one federal court adjudication. An earlier trial in a state court should not be claim preclusive, notwithstanding that the law of the rendering jurisdiction would purport to extinguish (or merge) the claim.

Only within the last dozen years has the Supreme Court steadily moved toward the proposition that, absent a clear intervention by Congress, the command of Section 1738 is both broad and absolute. Taken collectively, the Court's holdings indicate that when a state court renders a valid judgment,

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[17] Of course, the recognizing forum must enforce the earlier judgment. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908); *see also* Union Nat'l Bank v. Lamb, 337 U.S. 38 (The Missouri Supreme Court was found to have erroneously denied enforcement of a Colorado state court judgment on the ground that the action could not have been brought under Missouri law.), *reh'g denied*, 337 U.S. 928 (1949).

[18] *See, e.g.*, 18 WRIGHT ET AL., *supra* note 3, at 636–37, 641, 645; *see also* Finley v. Kesling, 433 N.E.2d 1112 (Ill. App. Ct. 1982); Shreve, *supra* note 3, at 1251–63.

other courts—both state and federal—ordinarily must give to that judgment the "*same* full faith and credit"[19] as would the rendering court. This command seems to apply to most significant features of res judicata. In order to assess more fully the Court's current approach, I shall briefly describe three cases that illustrate the prevailing construction of the full faith and credit statute.

First, in *Kremer v. Chemical Construction Corp.*,[20] the plaintiff filed employment discrimination charges with the federal Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964.[21] In accordance with that Act, his complaint was initially referred to the New York State Division of Human Rights, which determined that his discharge from employment was not based upon his national origin or religious faith.[22] An administrative appeal board upheld this determination as "not arbitrary . . . [n]or an abuse of discretion."[23] Thereafter, the plaintiff renewed his complaint with the EEOC and contemporaneously filed an appeal from the adverse state administrative determination with the Appellate Division of the New York Supreme Court.[24] The Appellate Division unanimously affirmed the agency determination.[25] After the EEOC also ruled against the plaintiff, he brought a Title VII[26] action in a United States district court. Eventually the case reached the United States Supreme Court.

In a 5-4 decision, the Supreme Court held that Section 1738, made applicable because of the state's judicial affirmance of the actions of its administrative agency, required the federal district court to give the same preclusive effect to the state judgment as it would have had in the New York courts.[27] Because it was clear that the judgment of the Appellate Division precluded the plaintiff from bringing another action in the courts of New York, he was likewise precluded from maintaining a Title VII action in the federal system.[28] Technically, the Court held that the *issue* of discriminatory discharge

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[19] 28 U.S.C. § 1738 (1988) (emphasis added).

[20] 456 U.S. 461, *reh'g denied*, 458 U.S. 1133 (1982). An earlier case, not reviewed here, is Allen v. McCurry, 449 U.S. 90 (1980). In *Allen*, the Court held that a search and seizure determination in a state criminal proceeding was preclusive in a subsequent suit in federal court brought under 42 U.S.C. § 1983. *See infra* note 38.

[21] *Kremer*, 456 U.S. at 463.

[22] *Id.* at 463–64.

[23] *Id.* at 464.

[24] *Id.*

[25] *Id.*

[26] Civil Rights Act of 1964, 42 U.S.C. § 2000e–2000f (1988).

[27] *Kremer*, 456 U.S. at 466–67, 485.

[28] *Id.* at 466–67.

had been settled by the state judgment and, since New York prohibited relitigation, the same question could not be newly adjudicated in federal court.[29]

A majority of the Court rejected the argument that since Title VII entitles the plaintiff to a trial de novo in federal court (after the exhaustion of administrative procedures), it follows that Section 1738 should be denied its usual effect.[30] In short, the plaintiff unsuccessfully urged that Title VII worked an implied partial repeal of Section 1738. The Court's view was that the statutory right to a federal trial de novo is confined to a trial that follows state and federal agency actions.[31] After a state's judicial action there is no entitlement to federal relitigation, and thus Section 1738, which applies to prior judicial outcomes, should be respected. Nor did the Court find evidence of an implied partial repeal of Section 1738 in Title VII's provision that the EEOC should accord "substantial weight"[32] to determinations made in state proceedings. This directive, said the Court, is addressed only to the EEOC and "does not bar affording the greater . . . [conclusive] effect which may be required by Section 1738"[33] in a federal court.

Two additional features of the *Kremer* opinion are noteworthy. The first is the Court's general approach to the question of when a statute enacted subsequently to Section 1738 effects an implied partial repeal of the latter. Such repeals, the Court was careful to say, are "not favored" and will be found only if, (1) the later statute is in "irreconcilable conflict" with Section 1738 or, (2) the subsequent statute is a substitute for the former and "covers the whole subject of the earlier one."[34] If this remains the Court's demanding approach, partial repeals are unlikely to provide frequent escapes from the dictates of Section 1738. A second aspect of *Kremer* speaks to the minimal quality of the initial judgment that suffices to bring it within the obligatory enforcement scheme of Section 1738. The Supreme Court took the view that the statute applies unless the rendering state's adjudication fails to satisfy the "minimum procedural requirements of the . . . Due Process Clause."[35] Thus, in most

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[29] *Id.*

[30] *Id.* at 468.

[31] *Id.* at 469.

[32] *Id.* at 470.

[33] *Id.*

[34] *Id.* at 468 (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976), and quoting in part Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).

[35] *Kremer*, 456 U.S. at 481; *see also* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380, *reh'g denied*, 471 U.S. 1062 (1985). *But see* Haring v. Prosise, 462 U.S. 306, 317-18 (1983) discussed *infra* note 36. Of course, if the state

circumstances, issues determined in constitutionally valid state court proceedings cannot be reopened in other courts.

In *Migra v. Warren City School District Board of Education*,[36] decided two years after *Kremer*, the Court explicitly confirmed the clear implication of its *Kremer* opinion that the full faith and credit statute embraces claim as well as issue preclusion. In the initial suit, the plaintiff, an educational supervisor, won job reinstatement and compensatory damages in the Ohio courts on a state-law theory of breach of contract.[37] Thereafter, she filed a Section 1983[38] suit in federal court.[39] Ultimately, the Supreme Court held that under Section 1738 the law of Ohio should dictate the claim preclusive effect of the earlier judgment.[40] The Court took as "settled" the proposition "that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."[41] Since the plaintiff advanced no reason why she could not have

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adjudication violates due process, the resulting judgment is not entitled to any force or effect in the rendering state either.

[36] 465 U.S. 75 (1984). Between the *Kremer* and *Migra* decisions, the Supreme Court unanimously decided Haring v. Prosise, 462 U.S. 306 (1983). The holding was unexceptional and the result consistent with the Court's other decisions construing the full faith and credit statute. Briefly, the Court held that a § 1983 plaintiff, *see infra* note 38, was not precluded by a prior Virginia criminal proceeding in which he had pled guilty to a charge of manufacturing a controlled drug. The § 1983 suit was against the officers who had conducted the search that led to the discovery of the illegal drug. No question as to the legality of the search had been raised in the state trial, and hence the issue had never been determined. State law, as interpreted by the Supreme Court, did not call for issue preclusion in these circumstances. Thus, § 1738 did not dictate issue preclusion, but rather called for the same effect in the federal suit that would be occasioned had the suit been filed in a Virginia state court.

In the course of the *Haring* opinion, Justice Marshall made a number of statements indicating that although § 1738 usually required adherence to state res judicata law, exceptions were sometimes warranted, especially in light of the federal courts' special role as the guardian of federal rights. *See Haring*, 462 U.S. at 313–14, 318. This dictum, however, does not appear to have produced a departure from the Court's unbroken line of decisions requiring strict adherence to the "same effect" language of § 1738. The *Haring* case is carefully reviewed in 18 WRIGHT ET AL., *supra* note 3, at 425–28 (Supp. 1992).

[37] *Migra*, 465 U.S. at 78–79.

[38] Section 1983 provides for a civil action against any person who, under color of state law, deprives the plaintiff "of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983 (1988). *See generally* ERWIN O. CHEMERINSKY, FEDERAL JURISDICTION §§ 8.1–8.11 (1989).

[39] *Migra*, 465 U.S. at 79.

[40] *Id.* at 85.

[41] *Id.* at 81.

asserted her Section 1983 claim in the earlier action, the modern doctrine of claim preclusion appeared applicable.[42] The only remaining question was whether Ohio had adopted the modern doctrine. The Court thus remanded the case so that the district judge could interpret the relevant state law.

Finally, in *Marrese v. American Academy of Orthopaedic Surgeons*,[43] the Court faced the possibility that a state judgment had a preclusive effect in a subsequent suit that was within the exclusive jurisdiction of the federal courts. In an Illinois suit, the plaintiffs claimed that their exclusion from membership in the defendant Academy violated state law.[44] Following an adverse judgment, plaintiffs then brought a federal court suit founded on federal antitrust laws.[45] Because these antitrust claims were within the exclusive jurisdiction of the federal courts, they could not have been asserted in the earlier suit.[46] Nonetheless, on appeal[47] from a trial court ruling adverse to the defendants, the court of appeals noted the possibility that the plaintiffs could have asserted similar state antitrust claims in the earlier suit or, alternatively, brought suit in a federal court and advanced all their claims. Applying the *federal* law of claim preclusion, the appeals court, sitting en banc, held that preclusion was appropriate.[48]

The Supreme Court, however, held that Section 1738 (and hence the law of Illinois) initially applied. The correct approach, said the Court, "requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment."[49] Even though an Illinois court could not have entertained the antitrust suit subsequently filed in the federal system (and

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[42] Essentially, the modern doctrine forces the plaintiff, on pain of loss (extinguishment or "merger"), to assert all available grounds of recovery that relate to the event or factual "transaction" that gave rise to the suit. *See* FRIEDENTHAL ET AL., *supra* note 2, at 627. Thus, a claim is defined in terms of the occurrences giving rise to the action and not in terms of separate legal theories or other more narrow concepts. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982).

[43] 470 U.S. 373, *reh'g denied*, 471 U.S. 1062 (1985).

[44] *Id.* at 375.

[45] *Id.* at 376.

[46] *Id.*

[47] Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd*, 470 U.S. 373, *reh'g denied*, 471 U.S. 1062 (1985).

[48] *Id.* at 1154–56. The court was divided on the proper resolution of the questions before it. There was no majority opinion and varying rationales were offered for and against the result. In the end, however, a majority of the judges concluded that federal law should determine the res judicata effects of the state judgment. On this fundamental point, the Supreme Court disagreed. *See infra* note 57 and accompanying text.

[49] *Marrese*, 470 U.S. at 381.

hence would not have had occasion to rule on the precise issue of the preclusive effect of an earlier state suit), state law may still provide general guidance. The res judicata law of Illinois may indicate the appropriate preclusive effect of the judgment of a court of limited subject matter jurisdiction when a plaintiff forwent the opportunity to sue in a court with broader authority, empowered to hear all of his "claims." For example, since the plaintiff in *Marrese* could have sued first in a federal court, which could have adjudicated his discrimination claim based on federal, as well as state law,[50] Illinois law may indicate that a prior state court judgment should be claim preclusive.[51] If this appeared to be the result under Illinois law, only then would a federal court have to face the question whether the federal antitrust laws created an implied partial repeal of Section 1738.[52] The case was thus remanded for a determination of state law.[53]

Although the decisions noted do not foreclose all possibilities that Section 1738 may yet be construed to allow f-2 some latitude in determining the consequences of an f-1 judgment, the Court's path is decidedly toward coterminous effects. It is true, of course, that we await definitive rulings upon the full range of important res judicata questions posed by the application of the full faith and credit statute. For example, the Court has not yet specifically addressed whether f-2 may give a broader issue preclusive effect to an f-1 judgment than would the rendering court. It is significant, however, that in *Marrese*, the Court clearly rejected an interpretation of Section 1738 that would permit a federal court to invoke *claim* preclusion when the rendering state court

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[50] The federal court could have entertained the state law claims, even if the parties were not diverse, by invoking pendent or supplemental jurisdiction. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 728–29 (1966); 28 U.S.C. § 1367 (1988).

[51] *Marrese*, 470 U.S. at 381–82.

[52] *Id.* at 383. In a concurring opinion, Chief Justice Burger expressed the view that if state antitrust law were "virtually identical" with federal law, the plaintiff's failure to assert a state antitrust claim should result in preclusion. *Id.* at 388. But he was unable to find a dispositive rule or precedent within Illinois' body of res judicata law. In these circumstances, in which state law is indeterminate, he found it permissible to formulate a federal rule. The federal courts, he noted, "have direct interests in ensuring that their resources are used efficiently . . . as well as in ensuring that parties asserting federal rights have an adequate opportunity to litigate those rights." *Id.* at 390. In the Chief Justice's view, when state law is silent on the question, "the concerns of comity and federalism underlying § 1738 do not come into play." *Id.*

[53] *Id.* at 387.

would not foreclose the claim in question.[54] To be sure, distinctions can be drawn between precluding a claim and simply precluding relitigation of an issue. Nonetheless, the fact that the Court denied federal claim preclusion in *Marrese* is significant because the claim in question was not only based on federal law, but also lay within the exclusive subject matter jurisdiction of the federal courts.

In any event, it suffices for now to rest simply on the Supreme Court's current rigorous construction of Section 1738. The Court's rather literal application of the statute is reflected in recent cases from the federal courts of appeals and the several states.[55] Together, the decisions from all levels of the judiciary suggest an emerging consensus that Section 1738 generally requires that f-2 strictly conform to f-1's res judicata doctrines. Not all of the lower court cases rest their holdings on the explicit rationale that the full faith and credit statute authoritatively directs adherence to the effects prescribed by the judgment court. Nonetheless, the collective results of these decisions provide impressive support for the proposition that f-2 is closely bound by f-1's rules of

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[54] Note also Chief Justice Burger's characterization of the Court's decision in *Migra*: "[o]nly recently, we reaffirmed in *Migra* . . . that a federal court is not free to accord greater preclusive effect to a state court judgment than the state courts themselves would give to it." Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 387–88 (1985) (Burger, J., concurring).

[55] *See, e.g.*, Gates Learjet Corp. v. Duncan Aviation, 851 F.2d 303 (10th Cir. 1988) (under § 1738, district court correctly relied on state law in deciding whether plaintiff was estopped from asserting its claims based on prior state court litigation); Gargiul v. Tompkins, 790 F.2d 265 (2d Cir. 1986) (regarding claim preclusion, held that § 1738 requires f-2 to give the same preclusive effect as would f-1); Hurt v. Pullman Inc., 764 F.2d 1443 (11th Cir. 1985) (recognizing federal court must adhere to preclusive effects of rendering state court when all elements of res judicata are present); Hagee v. City of Evanston, 729 F.2d 510, 512 (7th Cir. 1984) (citing § 1738 in holding, with respect to claim preclusion, that the court "must give the decision in the appellants' state court suit the same preclusive effect—no more, no less—as would the courts [of the rendering state]"); Mitchell v. Mitchell, 483 So. 2d 1152 (La. Ct. App. 1986) (section 1738 not cited, but court relied upon general proposition that recognizing state must give same res judicata effect as would judgment state); Aetna Life Ins. Co. v. McElvain, 717 P.2d 1081 (Mont. 1986) (action in first state foreclosed fraud defense in suit in second state pursuant to § 1738); Farmland Dairies v. Barber, 478 N.E.2d 1314 (N.Y. 1985) (state court concluded that it must give the same preclusive effect as the rendering state's courts, but cites only Article IV of the U.S. Constitution, not § 1738). *But see* Finley v. Kesling, 433 N.E.2d 1112 (Ill. App. Ct. 1982) (pre-*Kremer* decision allowing greater preclusive effect to avoid "absurd results" against public policy, by recognizing f-1's divorce decree but not its res judicata law).

claim and issue preclusion. And some of these cases speak directly and unambiguously to the meaning of the full faith and credit statute. For example, the Ninth Circuit Court of Appeals, citing Section 1738 with respect to both claim and issue preclusion, has concluded that it is "required to give state 'judicial proceedings' precisely the same preclusive effect they would have in the courts [of the rendering state]."[56]

IV. CONFORMITY: POLICY AND PRACTICAL UNDERPINNINGS

In the discussion that follows, I shall occasionally draw distinctions between claim and issue preclusion and between broadening and narrowing the preclusive effects of a prior judgment. Such distinctions, already familiar to most readers, help illuminate the trade-offs between a regime that allows the rendering court to chart the consequences of its judgment and one that permits the recognizing tribunal to play a major role in determining those effects. The central theme of the discussion, however, is that uncertainty as to the effects of a judgment not only leads to unproductive behavior on the part of litigants, but also weakens society's confidence in the judicial process.

There is substantial agreement, even among the commentators, that absent a Congressionally authorized exception, Section 1738 usually prohibits a recognizing jurisdiction from according a *less* preclusive effect to the rendering court's judgment than would be given by the judgment court.[57] As a general proposition, this conclusion appears quite sound. To permit a second forum to narrow the preclusive effect imposed by the rendering court impairs the ability of the rendering court to settle authoritatively the controversy before it. Finality and repose are central themes of res judicata, and a judicial judgment is designed, among other things, to achieve these ends. It thus seems incongruous for f-1 to deploy its sovereign power to resolve a dispute, only to discover subsequently that f-2 has reopened the controversy. The entry of a judgment

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[56] Shaw v. California Dep't of Alcoholic Beverage Control, 788 F.2d 600, 605 (9th Cir. 1986). Note that § 1738 does not refer necessarily to the res judicata law of the rendering sovereign, but rather to the "same full faith and credit [as the judgment would have] by law or usage" in the rendering court. 28 U.S.C. § 1738 (1988). *See* Burbank, *supra* note 3, at 798. But as a practical matter the rendering court usually applies its own res judicata law. *See infra* notes 70–72, 128–29 and accompanying text.

[57] *See, e.g.*, Jones v. City of Alton, 757 F.2d 878 (7th Cir. 1985); Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1241–43 (5th Cir. 1981); SCOLES & HAY, *supra* note 14, at 954; Shreve, *supra* note 3, at 1255.

carries with it a connotation of finality, at least in cases where the judgment or decree purports to be conclusive.[58]

Reliance by the initial parties (and privies) that the first judgment is definitive is a related, but distinct, reason to disallow f-2 from diminishing the preclusive effect of a prior judgment. Thus, for example, if the rendering court follows the modern practice of precluding all "claims" pertaining to the events sued upon (even if not actually advanced by the plaintiff)[59] the plaintiff's later assertion of previously unasserted claims in another court frustrates the interests of both the rendering forum and the defending party. Similarly, if under the judgment court's rules a particular issue is viewed as having been resolved in the original suit, a reopening of the question by another sovereign undercuts the interest of the rendering state and may thwart the legitimate expectations of the party who had previously prevailed. It is also significant that reliance upon judicial determinations often extends beyond the immediate parties. Settled expectations by nonparties such as insurers (who may be bound by the judgment) and creditors (who usually are not) illustrate the radiating effects of a judicial determination. The point is that stability and predictability, features long associated with res judicata, play familiar and decisive roles in the present context. Thus, the rendering state's interest in controlling the res judicata features of its judgments combines with the reliance interest of the parties and the public to counsel against permitting another forum to narrow the preclusive effects prescribed by the judgment court.[60]

To be sure, cases may arise in which f-1's res judicata rule seems so ill considered as to cast doubt on the wisdom of uniformly forbidding f-2 from diminishing the preclusive effect prescribed by the rendering court. Suppose, for example, a judgment court takes the uncommon position that issue

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[58] Traditionally, a judgment that is nonfinal (*e.g.*, interlocutory or subject to modification) does not produce res judicata consequences and need not be enforced by other courts. *See* FRIEDENTHAL ET AL., *supra* note 2, at 647–49; SCOLES & HAY, *supra* note 14, at 963–64, 991–92. But the requirement of finality has been softened in recent years. *See* SCOLES & HAY, *supra* note 14, at 991–92. For an examination of state-to-state enforcement of judgments, see Mortland, *supra* note 3.

[59] *See supra* note 42.

[60] Of course, if § 1738 were amended or construed to permit f-2 to apply its own law of judgments, neither the parties nor the public could thereafter justify their reliance upon the res judicata law of the rendering court. But this possibility does not detract from the practical reality that the parties and the public inevitably place some reliance on judicial judgments, nor does it erase the social utility of having a degree of stability and predictability associated with a judicial resolution.

preclusion results from a default judgment.[61] Should recognizing courts be compelled to take the same approach? There is no doubt that f-2 has an interest in the reliability of a prior adjudication that it is asked to accept as dispositive. It is thus tempting to say, as some commentators have, that "[i]t would be outrageous to compel other courts to adhere to this view."[62] This criticism, seductive in its appeal, nonetheless ignores countervailing considerations. First, it seems unlikely that due process would allow the judgment court to apply issue preclusion unless the defaulting party were given adequate prior notice that a failure to defend not only produced a default judgment, but also resulted in an adverse determination of issues that would require resolution at trial to support a plaintiff's recovery.

More importantly, assuming a constitutional objection was unavailing, to allow f-2 the privilege of ignoring "unwise" (but constitutional) res judicata policies opens a window of many opportunities. Assuming the f-1 judgment meets constitutional requirements, it is not clear what nonconstitutional principle limits the allowable exceptions to which f-2 is entitled. Suppose, for example, that f-1 considered a certain issue "finally determined" and thus entitled to a preclusive effect. F-2, however, considers the resolution of the issue merely interlocutory and thus applies its view that preclusion is inappropriate.[63] If it may ignore the res judicata rule of f-1 with regard to default judgments, may it not also displace f-1's rule of finality? Examples of possible departure could be extended to embrace f-2's nullification of f-1's broad compulsory counterclaim rule or f-2's refusal to honor f-1's "transactional" approach to defining a claim. There is, however, a defensible line of demarcation—one that has apparently been adopted by the Supreme Court.[64] That is the boundary marked by the Constitution: if f-1's judgment transgresses constitutional norms, it is not entitled to any "faith and credit," even in f-1 itself. Of course, the relative ease with which the constitutional standard can be satisfied[65] will sometimes legitimize aberrational judgments

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[61] *See* 18 WRIGHT ET AL., *supra* note 3, at 374.

[62] *Id.* at 643.

[63] *See supra* note 46; TEPLY & WHITTEN, *supra* note 14, at 669–70. Of course, as this Article attempts to demonstrate, under the full faith and credit statute, the res judicata effects prescribed by the rendering court are generally obligatory. *See, e.g., supra* notes 55–56 and accompanying text.

[64] *See supra* note 35 and accompanying text.

[65] The Supreme Court has indicated that before a state forum could apply its own substantive law it must have a "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (Brennan, J., plurality opinion). In *Hague*, the Court

that seem unwise or unfair. But the price of stability is to leave these occasional disquieting consequences to the process of appeal or to the incremental reforms that have tended to narrow the jurisdictional differences in the doctrine of res judicata.

Arguably different considerations are applicable when the recognizing forum broadens the preclusive effect of a state court judgment. Here, it may be suggested, f-2 is not eroding the initial judgment, but merely building upon it, largely to achieve economies in its own proceedings. Upon reflection, however, this contention seems awkward and contrived, especially with respect to claim preclusion. It has more appeal in the area of issue foreclosure, but ultimately should fail there too. The application of the "greater effect" argument to claim preclusion is illustrated when f-1 permits separate suits for property damage and personal injury (occasioned by the same event), but f-2 requires consolidation since the various harms arose from a cluster of integrated facts (a single "transaction"). The same pattern emerges where f-1 permits separate suits founded on distinct theories of recovery (such as breach of contract and restitution), but f-2 requires that all available grounds of recovery be advanced by a single suit.[66]

Analysis can begin with a basic proposition and a brief allusion to recent case law. In the illustrative circumstances just noted, it seems clear that f-2 should not enter a judgment declaring that the plaintiff's present claim was extinguished by the prior judgment because of his earlier failure to join it. The plaintiff did, after all, comply with the joinder rules of the rendering state. He should thus be shielded from f-2's purported power to nullify his claim because he failed to observe its rules. At least where f-1 and f-2 are courts of different sovereigns, it seems unwise, if not unconscionable, to hold the plaintiff to the standards of a different tribunal.[67] Aside from these prudential concerns, the

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upheld Minnesota's application of its uninsured motorist law to an accident that occurred in Wisconsin and involved residents of the latter state. The Court found it significant that the accident victim in question worked in Minnesota, that the insurer, Allstate, did business there, and that after the accident the victim's wife (the plaintiff) moved to that state, where she was appointed personal representative of her husband's estate.

The *Hague* decision has been critically reviewed, not so much for its announced test of when a forum may constitutionally apply its own law, but for its application of that test to the facts before the Court. *See, e.g.*, SCOLES & HAY, *supra* note 14, at 84–88. *See generally* David F. Cavers, *Symposium: Conflict-of-Law Theory After* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 1 (1981).

[66] For a discussion of the various approaches to determining what is a single claim or cause of action, see FRIEDENTHAL ET AL., *supra* note 2, at 619–29.

[67] It has been suggested that it might be a violation of due process if the second forum took the position that the plaintiff's unasserted claim was merged into the first judgment. *See* SCOLES & HAY, *supra* note 14, at 954–55 and commentary cited therein at note 8; *see also*

clear implication of the Supreme Court's opinion in *Migra v. Warren City School District Board of Education* is that the full faith and credit statute ordinarily blocks any attempt by f-2 to impose a broader claim preclusive effect on an f-1 judgment than would be accorded by the rendering forum.[68] Before concluding that the Court's position is justified, however, an additional circumstance remains to be considered.

The authority of f-2 to declare claim forfeiture may appear stronger when the source of the plaintiff's substantive rights in the f-1 suit is f-2's law. For example, if the plaintiff's claim in the f-1 suit were based upon f-2's wrongful death statute, f-2 might attempt to enforce its own view of the scope of a claim, even though the initial suit was in another jurisdiction.[69] In other words, in instances in which the second forum's law is the basis of the first trial, the latter jurisdiction might argue that its res judicata policies are so closely allied with the applicable "substantive" law that the judgment court lacked the power to allow the plaintiff to split his claims. The f-1 judgment thus merged the plaintiff's unasserted claim, even though f-1's rules permitted separate assertions. Of course, if this argument fails, Section 1738 appears to make the law of the rendering court the appropriate measure of preclusion. Therefore, if the initial court were empowered to apply its "claim splitting" rule to subsequent suits in that court and would do so (even though both suits were based upon a sister state's substantive law), the "law-supplying" state apparently could not alter the effects of the prior judgment.

The power of f-1 to apply its claim splitting rule to a "foreign" cause of action has not been definitively settled as a matter of theory. In reality, however, there is no doubt that courts routinely do consider their res judicata

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Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 70 n.54 (1982) (application by f-2 of differing res judicata rules could, in some contexts, violate due process).

[68] In *Migra*, the Court clearly contemplated that plaintiff's § 1983 suit in federal court would be precluded only if Ohio, where her first suit asserted state law grounds of recovery, used a modern, broad approach to defining a claim. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85–87 (1984). Implicit in the Court's analysis is the proposition that if Ohio would permit a subsequent § 1983 claim, so too must the federal district court. Of course, the *Marrese* case points strongly in the same direction. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); *see supra* notes 43–53 and accompanying text.

Professor Shreve has advanced policy-based arguments against permitting f-2 to give a broadened claim preclusive effect to an f-1 judgment. Shreve, *supra* note 3, at 1259–61.

[69] *Cf.* TEPLY & WHITTEN, *supra* note 14, at 703–04. Professors Teply and Whitten use a variation of the wrongful death illustration to make a different point. They advance the proposition that in certain circumstances f-2 ought to be free to apply its own rule of issue preclusion even if it narrows the preclusive effect of the first judgment. *Id.*

doctrines applicable, regardless of the source of the substantive law leading to the judgment. Frequently, the rules of preclusion of the two jurisdictions may be quite similar, so the issue never arises. In any event, in the early leading case of *Fauntleroy v. Lum*,[70] the Supreme Court appears to have largely foreclosed f-2's ability to control the effect of f-1's judgment. In *Fauntleroy*, a Missouri court rendered a judgment on a Mississippi transaction that involved gambling in cotton futures. Subsequently, the plaintiff brought suit in Mississippi on his Missouri judgment.[71] The fact that the plaintiff's original claim (now reduced to a judgment) was illegal and unenforceable in Mississippi was not a sufficient ground for Mississippi to decline to enforce the judgment.[72] The rendering court's adjudication met constitutional norms and thus its judgment could not be impeached simply because it violated the recognizing state's public policy.

Of course, *Fauntleroy* lies at the core of recognition—enforcement of a money judgment—and not in the outer layers of preclusion. It is not, in short, a case addressing f-2's authority to accord a greater (or lesser) effect to an f-1 judgment. Nonetheless, the Court's approach in *Fauntleroy* strongly suggests that the application by f-1 of its own law of res judicata to a judgment founded on the substantive law of f-2 would be binding in f-2 and other recognizing jurisdictions. Thus, so long as the judicial processes of the rendering forum meet constitutional standards, its res judicata laws are binding on other courts, even those whose substantive laws governed the claims and defenses of the parties. This, at least, appears to be the rule among co-equal sovereigns within the union. Obviously, federal law would prevail over state res judicata law if Congress so prescribed. In the absence of federal intervention prompted by interests exogenous to Section 1738, however, it appears that the res judicata consequences of a valid judgment can be prescribed by the rendering court even though the court is adjudicating a case based on foreign law.

The vesting of this authority in the judgment court is probably the correct result. The unifying force of the full faith and credit statute would be seriously eroded if the claim preclusion consequences of a judgment rendered in one state could be routinely broadened through the application of another state's substantive law. It is enough to predict the uncertainty that would cloud such a process of displacement. Furthermore, as the balance of this Article tries to

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[70] 210 U.S. 230 (1908); *see also* Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949). For a recent application of *Fauntleroy*, see Coghill v. Boardwalk Regency Corp., 396 S.E.2d 838 (Va. 1990).

[71] *Fauntleroy*, 210 U.S. at 233–34.

[72] *Id.* at 234–38.

demonstrate, a judgment court usually has a preemptive interest in applying its own rules of res judicata. Such a court can apply its principles of res judicata even though it would lack the authority under the due process clause to apply its own substantive law. Thus, where a court's relationship with the parties or the transaction is so tenuous that it could not constitutionally apply its own substantive law to the claims or defenses, it should nonetheless be able to apply its law of judgments. As the litigating court, its constitutional claim to the power to specify the effects of its judgment is compelling simply because it has an interest in controlling the consequences of its judicial resolution. In conventional parlance, the forum that tries a case has, by that fact alone, sufficient contacts with the parties and the underlying events to constitutionally apply its own law of res judicata.[73] When it appears that f-1's judgment is intended to be defined by its own rules of res judicata—as, for example, the application of its usual claim splitting rule—a court of recognition will ordinarily be powerless to substitute its own rule even if its substantive law controlled the controversy. Among the states, strong differences in policy will not suffice. The full faith and credit statute will compel f-2 to respect the consequences of a valid f-1 judgment.

It may be, however, that the recognizing state could refuse to entertain the plaintiff's second suit, thus relegating him to the rendering forum or some other more hospitable jurisdiction.[74] This option ought to be an alternative for any recognizing jurisdiction with a broad claim preclusive rule in which the first suit could have been brought. Whether or not f-2 supplied the substantive law underlying the first judgment should not be decisive; rather the critical inquiry should be whether the plaintiff initially could have joined, in f-2, all

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[73] *See supra* note 59; *cf.* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (forum state may constitutionally apply its long statute of limitations to class action suit, even though it lacked authority to apply its substantive law). *But see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (forum state cannot apply its substantive law to class action claims that have insufficient connection with forum).

Of course, the statement that a rendering court may generally apply its own rules of res judicata does not mean that the court is unconstrained with respect to who is bound by its judgment. There is a constitutional limit upon f-1's authority to bind nonparties. 18 WRIGHT ET AL., *supra* note 3, at 415–19. Generally speaking, there is a "due process right to be heard," either personally or through adequate representation. Unless this right is observed, one cannot be bound by the results of a judicial proceeding. *Id.* at 409, 415. Nonetheless, litigation involving property interests usually produces binding effects upon successors in interests to the same property. *Id.* at 140. Here it is the nature of the property relationship, rather than representation, that justifies the result. *Id.*; *see also infra* note 84.

[74] This suggestion is found in 18 WRIGHT ET AL., *supra* note 3, at 645.

claims and defendants against whom he seeks redress. Over the general run of cases, the modern expansive view of the dimensions of a claim produces the greatest efficiency; it consolidates in one suit related "claims" that under the older views could be separately pursued. The recognizing jurisdiction can thus take the position that it is entitled to decline to entertain a second suit, the maintenance of which is at odds with its view of efficient procedure.

Whether this "door-closing" posture is immune from a constitutional attack based on the argument that f-2 is unfairly discriminating against f-1's law is not entirely clear.[75] One could note, for example, that although the plaintiff has filed two suits when one would suffice, f-2 bears only the burden of entertaining the second suit. The burden of litigating the second suit is probably less than the burden that would have been borne by f-2 had the plaintiff simply filed a consolidated suit in that court. Note the possibility that where suits are split between the first and second courts, the latter court may conserve some judicial resources because it is entitled to apply issue preclusion to one or more of the determinations made in the prior proceeding. Nonetheless, the central point is that f-2 should not be required to support f-1's rule which is not only wasteful of public and private expenditures, but subjects the defendant to the expense and disruption of multiple suits. The plaintiff's decision not to bring the initial suit in f-2 justifies f-2's declination to abet his second effort.[76]

Whatever the eventual resolution of these several issues may be, there is likely to be a clear distinction between f-2's ability to close the doors of its courts, essentially a "non-merits" jurisdictional declination, and its power to

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[75] There is some risk that f-2 would be discriminating against a foreign cause of action without sufficient justification and thus its declination to entertain the plaintiff's second suit would violate the full faith and credit clause of the Constitution. *See* U.S. CONST. art. IV, § 1 (providing that "the public acts" of the several states are entitled to the "full Faith and Credit . . . of every other state"). The leading case construing this provision is Hughes v. Fetter, 341 U.S. 609 (1951), which found unconstitutional Wisconsin's refusal to entertain an action founded on Illinois' wrongful death statute. In *Hughes*, the Court characterized the problem as a conflict between "the strong unifying principle embodied in the full faith and credit clause" and the policy of the state in which plaintiff brings suit on a foreign cause of action. *Id.* at 612. But *Hughes* has not been extended to deny f-2 the right to apply its own shorter statute of limitations to a foreign cause of action. *See* Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) (providing an argument for a "procedural declination" in the present context); *cf.* 28 U.S.C. § 1738 (1988) (providing that public "Acts . . . shall have the same full faith and credit in every court . . . as they have by law or usage in the courts of . . . [the] State . . . from which they are taken").

[76] This argument seems to be stronger than those advanced to support the permissible practice of applying a forum's shorter statute of limitations to a foreign cause of action. *See supra* notes 73, 75; *cf.* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

declare that a foreign judgment extinguished a claim when no such result was dictated by the judgment court.[77] Ordinarily, sound policy counsels against allowing a second court to expand the claim preclusive effect of an earlier judgment. The rigorous application of the "same full-faith-and-credit" standard of Section 1738 produces the preferable result.

The question whether f-2 should be permitted to give a broadened *issue* preclusive effect to f-1's determinations has sparked a lively (and continuing) discussion.[78] In modern litigation, this question occupies center stage, and it is here, especially, that careful attention must be paid to the risk avoidance behavior of the litigants. The principal argument favoring f-2's authority rests on the wastefulness and perceived unfairness occasioned by forcing the second court to relitigate an issue that has already been resolved under standards that satisfy it. This argument can be coupled with the contention that the vindication of f-2's procedural interests by extending the effect of f-1's judgment does not seriously impair the interests of the first forum. Again, the Supreme Court's recent constructions of Section 1738 strongly suggest that the second forum will be denied the authority to expand issue preclusion.[79] One begins with the language of the statute, which, as noted, demands the "same full faith and credit"[80] and thus lends itself naturally to a construction that dictates conformity. This apparent meaning is not easily avoided by the argument that for the recognizing court to give a greater issue preclusive effect does not erode the prior judgment, but only adds a "procedural" overlay. Issue foreclosure cannot be so easily cabined. Furthermore, once it is determined that the command of Section 1738 applies to issue preclusion—and the Supreme Court has clearly so held[81]—it is not easy to escape the textual requirement of conformity. Thus, one response to f-2's attempt to accord a more sweeping preclusive effect than f-1 would permit is to conclude, without elaboration, that the full faith and credit statute forbids this departure. Many recent lower court

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[77] Oddly, when the Wisconsin trial court refused to entertain an action based on the Illinois wrongful death act in Hughes v. Fetter, 341 U.S. 609 (1951), the trial judge described his dismissal as "on the merits." *Id.* at 610. Exactly what was meant by this phrase was never clarified. *See* P. LOW & J. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 354, n.a (2d ed. 1989).

[78] *See, e.g.*, DAVID VERNON ET AL., CONFLICT OF LAWS: MATERIALS & PROBLEMS § 703, 587–92 (1990); 18 WRIGHT ET AL., *supra* note 3, at 644–48; Jeffrey E. Lewis, *Mutuality in Conflict—Flexibility and Full Faith and Credit*, 23 DRAKE L. REV. 364, 374–75 (1974); Shreve, *supra* note 3, at 1257, 1259.

[79] *See supra* notes 19–34 and accompanying text.

[80] 28 U.S.C. § 1738 (1988).

[81] *See supra* notes 19–36 and accompanying text.

cases take this approach.[82] The cases usually do not, however, present a cogent rationale that supports conformity as a desirable result, but instead rely merely on statutory construction. The commentators have given more sustained attention to the problem, but their views are mixed.[83] It is thus important to substantiate the legitimacy of restricting f-2's preclusive authority.

It may be useful to point out the contexts in which the present problem arises. Suppose f-1, the state court in which the initial suit reaches judgment, adheres to the rule of mutuality. F-2, the state or federal tribunal in which the second suit is filed, allows nonmutual preclusion. Within this general pattern there are variations, as where the judgment court has abandoned mutuality when issue preclusion is invoked defensively, but adheres to the mutuality requirement when issue preclusion is invoked offensively.[84] Patterns outside the rules of mutuality furnish additional illustrations as, for example, where the rendering forum characterizes an issue resolved in the first suit as "mediate" (in contrast to ultimate), and hence not embraced by issue preclusion;[85] f-2's

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[82] *See, e.g.*, Gates Learjet Corp. v. Duncan Aviation, 851 F.2d 303, 305 (10th Cir. 1988); Cullen v. Margiotta, 811 F.2d 698, 732–33 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); Wicker v. Board of Educ. of Knott County, 826 F.2d 442, 450 (6th Cir. 1987) (announces principle, but cites cases instead of statute); Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 605–07 (9th Cir. 1986); Hagee v. Evanston, 729 F.2d 510, 512 (7th Cir. 1984) (dictum).

[83] *Compare, e.g.*, 18 WRIGHT ET AL., *supra* note 3, at 644–48 *with* 18 JAMES MOORE, FEDERAL PRACTICE ¶ 0.406, at 265–75.

[84] The central issue, of course, is whether, or under what conditions, one who was not a party to the first suit (and hence not bound) can invoke issue preclusion against one who was a party. The prototypical defensive use involves a defendant who was not a party to the initial suit, but who subsequently raises issue preclusion as a shield against liability. In the classic offensive use, a plaintiff who was not a party to the first suit invokes issue preclusion against a defendant from the initial action. There are variations in the patterns of party structure that emerge when first and second suits are viewed in combination. *See* RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1145–47 (6th ed. 1990). For a useful examination of defensive and offensive issue preclusion and how courts have responded to some of the concerns produced by various party configurations, see FRIEDENTHAL ET AL., *supra* note 2, at 686–93.

[85] A few courts attempt to draw the uncertain distinction between "mediate" and "ultimate" factual determinations and allow issue preclusion only with regard to the latter. The leading case advocating this distinction is Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). The basic idea is to confine issue preclusion to the factual determination that directly underlies an element of the case made essential by the substantive law, excluding subordinate determinations implicitly or explicitly subsumed by the ultimate determination. For further explanation, see FRIEDENTHAL ET AL., *supra* note 2,

rules, however, reject this distinction and call for foreclosure. Similarly, f-1 may view a particular determination (for example, an alternative holding) as unnecessary to the final judgment;[86] the recognizing court, however, treats the determination as essential. Finally, suppose f-1 confines issue preclusion to the particular historical facts underlying the first suit—for example, to only those tax years under consideration or to only those among identical contracts that were the subject of the first suit;[87] f-2, however, applies preclusion more broadly to embrace similar facts or contractual terms.

Differences might, of course, be drawn among these illustrations in terms of the appropriateness of compelling conformity to the first judgment. It suffices for present purposes, however, to note simply that in each instance the second forum wishes to avoid relitigation of an issue that has previously been determined under circumstances that meet the recognizing court's criteria for issue preclusion. At first blush, it is tempting to conclude that the predominant interest lies with the recognizing forum. Putting aside the language of Section 1738 (which in any event can be interpreted or reinterpreted to accommodate a sensible result), how is f-1's interest harmed if f-2 accords the rendering court's judgment a broader issue preclusive effect than f-1 would give it? F-2's interest in applying its own rule is apparent: it does not wish to expend its judicial resources to redetermine an issue that has been resolved to its satisfaction. The rendering forum's interests, on the other hand, are not so readily discernable.

One way to approach the problem is to build upon the previous discussion, this time by trying to identify the policies that support the power of the rendering sovereign to *limit* the effect of its judicial judgments. This perspective suggests an examination of the nature and extent of the rendering state's interests, which, for present purposes, may be equated with those of its judicial tribunals. There are, however, other familiar factors that bear on the present inquiry. Considerations of fairness suggest that litigants, as well as those who might join or intervene, should be able to predict the res judicata consequences of a particular outcome. It is one thing for parties to attempt to

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at 665–67 ("Imagine a lawsuit as a logical structure resembling a pyramid. At its base are the facts introduced into evidence. From these facts are drawn conclusions which, when combined with other deductions or evidence, lead eventually to 'ultimate facts' that establish a legal right, duty or status."). The ultimate-fact distinction has lost support in recent years. *Id.* at 666–67.

[86] "Alternative holding" is meant to denote alternative grounds of disposition by a court, either of which, standing alone, will support the judgment rendered (*e.g.*, there are alternative findings in defendant's favor: defendant was not negligent and plaintiff was contributorily negligent). For further discussion, see 18 WRIGHT ET AL., *supra* note 3, at 203–08.

[87] *See* 18 WRIGHT ET AL., *supra* note 3, at 646. *See generally id.* at 248–58.

assess whether the trier will find the defendants liable and, if so, to estimate the extent of the damage award or the terms of equitable relief. It is more difficult, however, to forecast the probability of future suits, possibly in other jurisdictions, and to assess the risk of preclusion. In the present context, if other forums were free to disregard the issue preclusion rules of the rendering court and to accord a greater preclusive effect, the significant possibility of foreclosure in future suits will usually cause the initial litigants to invest disproportionate resources in the first suit. Although the defendants in the original action are obvious targets for issue preclusion, plaintiffs also must be wary. They may be sued on a related claim by the initial defendants or they may be sued by others who hold potential claims arising from the events that underlie the first suit. Since personal jurisdiction is relatively easy to obtain,[88] future claimants may find an available forum that (if permitted) would expand the preclusive effect of issues determined in the first contest. This possibility has not, of course, been lost on the trial bar. Tacticians warn of the potentially dire consequences of losing the initial suit, cautioning that "a small case may turn into a dangerous judgment."[89] Thus litigants in f-1 have a legitimate interest in identifying the rule that will govern preclusion in future suits involving one or more of the original parties. Even those who are in a position to join a suit or intervene can lay claim to a strong interest in having foreknowledge of the res judicata consequences of a final judgment.

Obviously, a rule which gives the second forum considerable freedom to apply its own issue preclusion principles makes very difficult any reasonable forecast by the original litigants. Since it is uncertain where the next suit will be filed, the parties will have an incentive to conduct the first suit as if the stakes are high. In this context, the public and private resources invested in the initial suit are apt to be disproportionately large, when compared to the

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[88] The various bases for obtaining personal jurisdiction are examined in SCOLES & HAY, *supra* note 14, at 261–349.

[89] Charles R. Bruton & Joseph C. Crawford, *Collateral Estoppel and Trial Strategy*, 7 LITIGATION 30, 32 (1981). The same authors indicate that the extent of trial preparation and the "vigor of a defense" are affected by the potential of issue preclusion. *Id.* at 32, 50; *see also* Jonathan C. Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 GEO. L.J. 1079 (1982). Thau points out that the potential for subsequent "related civil litigation can affect the conduct of both the prosecution and the defense, and arouse the curiosity or participation of individuals who otherwise would play no role in the criminal proceeding." *Id.* at 1116. Thau also warns that the "trend toward applying collateral estoppel based upon criminal conviction frequently transforms a criminal prosecution into the first and most important battlefield of civil litigation." *Id.* at 1120–21.

ostensible "value" of the immediate economic interest of the litigants. Familiar pretrial skirmishing such as motion practice, discovery, and jury selection will expand to reflect the added risk of future litigation. The trial itself is likely to be more protracted and contentious. In short, the risk-avoidance behavior of the suitors has an impact on the judicial processes of the first tribunal which, to exaggerate the point, may have to "try a thousand dollar case as if it were worth a million."

This disproportionate investment centered in the rendering forum can be avoided if the judgment court can prescribe the effects of its outcome. If f-1 limits the preclusive effects and if other courts are forced to respect these restrictions, the case will be tried in a manner that approximates its present "worth." Conversely, if f-1 permits a sweeping preclusive effect, it has acquiesced in more extensive trial proceedings that reflect the added risk of broad preclusion in future litigation. In essence, it is willing to absorb the costs associated with more protracted litigation because its final resolution will not only settle the present contest, but will foreclose or restrict future controversies.

At a related, more abstract level, f-1 also has an additional interest in restricting the effect of its judgment through uniform recognition of its preclusion rules. This interest embraces issue preclusion, but includes, as well, other features of res judicata. Presumably, the courts and legislature of the first sovereign have made a thoughtful determination, based on considerations such as fairness, repose, reliance and efficiency, as to the appropriate preclusive effects of its judicial judgments. The sovereign has, for example, determined what risks the parties should bear with regard to unasserted claims and counterclaims. It has reached similar conclusions with respect to issues that are resolved by compromise or admissions, issues that are resolved on alternative grounds, and issues that are resolved as an intermediate step in reaching an ultimate conclusion. Similarly, the sovereign has determined what persons should be bound by a judgment either through "privity"[90] with a party or because their interests were adequately represented, for example, through "virtual representation."[91] Such policy judgments by the rendering state do

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[90] Sometimes one who is not a party to a suit is bound by the judgment because of his relationship to one who is a party. It is often said that the nonparty is in a relationship of "privity" with a party. This label is unhelpful in determining who is bound, but does serve to denote the existence of a sufficient linkage between the party and the outsider to justify binding the latter. For a discussion of privity, see FRIEDENTHAL ET AL., *supra* note 2, at 682–86.

[91] There is some authority that even in the absence of a traditionally recognized privity relationship, *see supra* note 90, a nonparty can be bound by an issue determination if a

not, of course, always represent the optimal trade-offs among the various considerations. This, however, is not the point. The point is that these determinations are superseded when other sovereigns are able to substitute their inconsistent views. To sound the now familiar refrain, the initial court, which deployed the power of the state to resolve the dispute before it, ordinarily should have the augmenting authority to prescribe the incidents of its judgment.

Thus, private and public interests coalesce to support the authority of a court to place binding limitations on the issue preclusive effects of its own judgment. On a broader scale, protection of these interests suggests the desirability of obliging recognizing courts, despite strong policy or procedural differences, to respect the particulars of the res judicata rules of the rendering court. If this general thesis, which disallows either a greater or lesser effect, is sound, then the Supreme Court's recent interpretations of Section 1738 are quite defensible, and they are legitimate not simply because the "statute says so," but also because of the underlying policy concerns. Although the Court has not dwelled on the interests of the rendering state and the initial litigants, the result of its recent decisions,[92] if extended to related contexts, is to prevent other tribunals from undermining these dominant interests. No doubt, a strict requirement to honor the res judicata effects of the original judgment may seem excessively rigid.[93] But further reflection suggests that uniform adherence to the standard of conformity is preferable to a more flexible, ad hoc, policy approach. Only when the initial judgment is tainted by constitutional flaws or violates the rules of the rendering forum should other courts be free to ignore it. No doubt, the pursuit of unity by the convention of allowing the rendering court to export its res judicata doctrines comes at a price. But in the absence of a set of national standards, one must choose between a strict interpretation of Section 1738 and a more discriminating, but less stable, regime. Thus, although it is useful to examine various particulars of res judicata and to cite

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party to the trial in question adequately litigated the issue and shared an identity of interests with the outsider. For a discussion of "virtual representation," see 18 WRIGHT ET AL., *supra* note 3, at 494–502.

[92] *See supra* notes 19–43 and accompanying text.

[93] *See, e.g.*, 18 WRIGHT ET AL., *supra* note 3, at 629. In the course of deciding a case in 1986, the Court, with apparent attentiveness, remarked that "28 U.S.C. § 1738 governs the preclusive effect to be given the judgments . . . of state courts. . . ." University of Tennessee v. Elliott, 478 U.S. 788, 794 (1986). A subsequent passage in the *Elliott* case suggests an implicit premise that § 1738 applies only to rendering state courts. *See id.* at 796. The Court rejects a distinction within § 1738 between federal and state agencies. The Court finds the distinction invalid not because § 1738 draws no line between federal and state tribunals, but rather because it applies only to judgments of judicial entities and not to those of administrative agencies. *Id.*

contextual justifications for a specific result, the overriding theme that emerges here highlights the importance of predictability and the dominance of the rendering forum.

V. THE "*ERIE*" PROBLEM

On its face, Section 1738 applies only when the initial judgment is given in a state court. There is support, however, in older Supreme Court decisions for the application of the statute when the rendering court is a federal tribunal.[94] These early decisions lend themselves to differing interpretations,[95] and it is difficult to believe that if the question were squarely put today, the Supreme Court would find that the statute controlled federal judgments.[96] The terms of the legislation seem plainly to include only judgments rendered by the court of a state, territory, or possession.[97] Furthermore, there is considerable, though not uniform, recognition among state and lower federal courts that Section 1738 is confined to state court judgments.[98] In the discussion that follows, it will be assumed that the statute is inapplicable when the rendering court is federal. This assumption, however, is not critical to the analysis presented. Even if the statute applied, it would be necessary to ascertain the applicable res judicata law in the rendering federal court. This, of course, is the central feature of Section 1738—to "look back" to the initial tribunal.

This approach, however, is not unique to the statute. It is generally the practice of courts faced with determining the effects of a judgment to examine

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[94] *See* 18 WRIGHT ET AL., *supra* note 3, at 651–57; SCOLES & HAY, *supra* note 14, at 970 n.8; Degnan, *supra* note 5, at 744–50.

[95] *See* SCOLES & HAY, *supra* note 14, at 970 n.8; *see also* PAUL BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1603 (3d ed. 1988).

[96] 18 WRIGHT ET AL., *supra* note 3, at 621. For a forceful demonstration that the statute is inapplicable when the rendering court is federal, see Burbank, *supra* note 3, at 739–47.

[97] "[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1988); *see also supra* notes 7–10 and accompanying text.

[98] *See, e.g.*, Derrickson v. City of Danville, 845 F.2d 715, 720 (7th Cir. 1988); Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1183 (11th Cir. 1981); Pilié & Pilié v. Metz, 547 So. 2d 1305, 1308 (La. 1989). *But see* Transamerica Trade Co. v. McCollum Aviation, Inc., 424 N.E.2d 740, 742 (Ill. App. Ct. 1981).

the res judicata law of the rendering court.[99] Reference to a prior judgment to assess its consequences is an inescapable first step in deciding whether to honor it. Of course, in the absence of statutory compulsion, it may be one thing to defer to the core features of a prior judgment (such as its validity for purposes of enforcement) and another to defer to its res judicata law. But the general thesis advanced here, which is neither novel nor original, is that federal common law compels recognizing courts to honor the res judicata effects of a federal judgment.[100] The decided cases may not always make the fine points, but their thrust is apparent. Federal judgments are, generally speaking, entitled to the same kind of "faith and credit" as are state court judgments, even though

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[99] *See, e.g.*, Brown v. Brown, 387 So. 2d 565 (La. 1980), *cert. denied*, 450 U.S. 966 (1981); Mitchell v. Mitchell, 483 So. 2d 1152 (La. Ct. App. 1986); Benjamin v. S.R. Smith Co., 632 P.2d 13 (Or. 1981). Foreign-country judgments are outside the sweep of full-faith-and-credit obligations, but are generally enforced as a matter of comity. SCOLES & HAY, *supra* note 14, at 960. There is an emerging trend to adopt the res judicata rules of the rendering country. *Id.* at 1002–03. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS '§ 98, 298–303 (1971) cautiously restricts the preclusive effect of foreign-country judgments. SCOLES & HAY, *supra* note 14, at 956–57, 1002–03. The *Restatement* position has drawn criticism. *See id.* at 958 and commentary cited in note 7.

[100] In essence, federal common law endows federal judgments with the same obligatory effect as the full faith and credit statute provides for state judgments:

> The meaning of federal court judgments is dictated by principles of federal common law, which other federal courts are required to respect and which are binding on state courts by virtue of the supremacy clause. The net result is that essentially the same approach is required no matter what court rendered the first judgment and no matter what court is to give effect to that judgment.

LOW & JEFFRIES, *supra* note 77, at 353. That federal common law is the source of the obligation to respect federal judgments is often acknowledged, but not universally accepted. There are other rationales, including, most notably, the conclusion that the full faith and credit statute applies when the rendering tribunal is a federal court. *See* 18 WRIGHT ET AL., *supra* note 3, at 653–54; *see also supra* text at notes 80–84. The RESTATEMENT (SECOND) OF JUDGMENTS § 87, cmt. a. (1982) takes the position that the "rules of res judicata express the quality of a court's authority . . . [and that] the effects of a federal judgment are a legal implication of [the first and third articles of the United States Constitution]. . . ." *Id.* at 315. Because the comment assumes that Congress could change the judicially formulated rules, *see id.*, the nature of the court created rules appears to be federal common law. For a general analysis of the nature and limits of federal common law, see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

neither the full faith and credit clause of the Constitution, nor its statutory counterpart, is directly applicable.[101]

The Supreme Court's opinion in *University of Tennessee* v. *Elliott*,[102] reinforces the predictable conclusion that federal common law will fill the gap that results from the limited reach of the full faith and credit statute. The issue in *Elliott* was whether a state administrative agency's factual determinations would be issue preclusive in a subsequent federal suit based on Title VII and Section 1983.[103] The Court noted that since Section 1738 was inapplicable to unreviewed state administrative determinations,[104] the question was whether to fashion federal common law making the prior findings preclusive. "We have," said the Court, "frequently fashioned federal common-law rules of preclusion in the absence of a governing statute."[105] The common-law rule that emerged in *Elliott* dictated issue preclusion with regard to the plaintiff's Section 1983

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[101] Early Supreme Court cases established that states were bound by federal preclusion law, but there was no consistent explication of the underlying reasons. *Compare* Embry v. Palmer, 107 U.S. 3 (1882) (full faith and credit statute applies) *with* Dupasseur v. Rochereau, 88 U.S. 130 (1874) (res judicata effect of federal court judgment presents a question arising under the federal laws establishing the court and granting its jurisdiction). It is odd that a principle so basic as the requirement that state courts honor federal judgments, including res judicata attributes, has not been given crisp, consistent, and repeated articulations by the Supreme Court. Nonetheless, that there is such a requirement cannot be doubted. *See, e.g.*, Myers v. International Trust Co., 263 U.S. 64, 69 (1923) (noting that the issue was "whether full faith and credit" was accorded to a bankruptcy judgment); Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255, 265 n.11 (10th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) (quoting 18 WRIGHT ET AL., *supra* note 3, at 648–49, that it would be "unthinkable" to maintain that state courts could disregard federal judgments); Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 243–44 n.2 (5th Cir. 1983) (federal rules generally define preclusive effect when second suit is in a state court); Transamerica Trade Co. v. McCollum Aviation, Inc., 424 N.E.2d 740, 742 (Ill. App. Ct. 1981) (federal judgments, like state judgments, are entitled to full faith and credit); Pilié & Pilié v. Metz, 547 So. 2d 1305, 1308 (La. 1989) ("a constitution that requires state courts to give full faith and credit to judgments of other state courts could not contemplate that state courts should be free to disregard the judgments of federal courts"; federal res judicata generally governs). As noted, *supra* note 99, the res judicata effect of a federal judgment is determined by looking back to the rendering federal court even when the recognizing tribunal is another federal court. *See* Wehling v. Columbia Broadcasting Sys., 721 F.2d 506, 508 (5th Cir. 1983).

[102] 478 U.S. 788 (1986).

[103] *See supra* notes 30–31, 38 and accompanying text.

[104] *Elliott*, 478 U.S. at 794.

[105] *Id.*

assertions, but not with regard to his Title VII allegations, since Congress apparently intended a federal trial de novo. Of course, it is one thing to fashion federal common law that forces federal courts to defer to the results of state proceedings; it is another, and surely closer to sensitive federalism concerns, for a federal court to force states to accept the consequences of a federal judgment.

Nonetheless, a tentative hypothesis can be formed by accepting several of the propositions set out in the preceding discussion. First, although the full faith and credit statute does not apply when the rendering court is federal, the correct approach is nonetheless for other courts to look to the law of judgments of the initial federal tribunal. Second, federal common law is applicable in the absence of Congressional action. Third, federal common law normally dictates the application of the res judicata law of the rendering federal court. Of course, since federal common law is embraced by the Supremacy Clause of the Constitution,[106] conformance is commanded in state as well as other federal courts. The sweep of these statements is consciously broad, embracing variant contexts in both federal question and diversity cases. Elaboration will follow, but it suffices for now to reiterate that unless recognizing courts uniformly refer to the res judicata doctrines of the rendering tribunal, the initial litigants will have no reasonable means of predicting the consequences of the first suit. With no common obligatory referent, subsequent courts will sometimes apply their own law of judgments. This questionable practice leads to the resulting uncertainty and uneven resource allocation discussed earlier in this article.[107]

It remains to work through some particular federal-state problems. This examination can begin with what is settled or at least seems increasingly accepted in the cases. There is no quarrel about the application of res judicata issues when both f-1 and f-2 are federal courts and the governing substantive law for each of the two cases is federal. The federal law of judgments, largely decisional in origin, applies.[108] And there should be little difficulty when f-1

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[106] U.S. CONST. art. VI. In areas in which federal courts have authority to formulate federal common law, the resulting decisional rules take precedence over conflicting state law. *See* D'Oench, Duhime & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942); CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 392 (1983).

[107] *See supra* notes 84–93 and accompanying text.

[108] Leading cases are Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) and Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313 (1971), in which the Supreme Court fashioned the federal common-law rules of nonmutual preclusion. *See* Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); *see also* Conner v. Reinhard, 847 F.2d 384 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988); 18 WRIGHT ET AL., *supra* note 3, at 618–24, 656 (making the broader point that if

applied federal substantive law to the controversy before it, but f-2 is a state court or a federal court applying state substantive law, as in a diversity case. Here again, the federal law of res judicata controls. In short, the fact that the rendering court is a federal court adjudicating federal rights is the decisive factor, regardless of the nature of the recognizing court.[109]

The difficulties arise when all or part of the substantive law applied by the rendering federal court is state law. The pristine example, of course, is a federal suit that is jurisdictionally founded on diversity of citizenship and resolved solely on the basis of state substantive law.[110] If a subsequent suit is filed in some other (federal or state) court, what law governs the res judicata effect of the first judgment? The fact that federal common law, like the full faith and credit statute, refers all other courts to the res judicata law that would be applicable if the second suit were in the rendering federal court does not answer the ultimate question. That question, of course, is whether the rendering diversity court is obliged to apply the res judicata laws that obtain in the state where the federal judgment was entered. Here the answer depends upon the reach of federal common law. It is one thing to have federal common law identify the referent court, and another to have it impose the federal law of res judicata.

Initially it is necessary to identify judgments to which the Federal Rules of Civil Procedure speak, for it is here that the case for a federal standard seems most compelling. Rule 13(a) (establishing compulsory counterclaims) and Rule 41(b) (providing for involuntary dismissals with prejudice) are principal examples of federal rules that contemplate a sanction that is partially enforced

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the first court is a federal court and adjudicates a federal question, federal rules are used to determine the res judicata effects). For an early case that speaks generally to the authoritative status of federal judgments in "federal questions" cases, see Deposit Bank v. Frankfort, 191 U.S. 499, 517 (1903).

[109] *See, e.g.*, Seven Elves, Inc. v. Eskenazi, 704 F.2d 241 (5th Cir. 1983); Poe v. John Deere Co., 695 F.2d 1103, 1105 (8th Cir. 1982); 18 WRIGHT ET AL., *supra* note 3, at 618–24; *cf.* Travelers Indem. Co. v. Sarkisian, 794 F.2d 754, 761 n.8 (2d Cir. 1986) (dictum asserting that federal res judicata law controls all judgments including those in diversity cases initially rendered by a federal court and citing section 87 of the *Restatement (Second) of Judgments*).

[110] The problem, of course, is not confined to cases arising under a federal court's diversity jurisdiction. For example, cases that initially rest on federal question jurisdiction may also involve state law claims entertained under the court's pendent or supplemental jurisdiction. *See supra* note 37; *cf.* Harnett v. Billman, 800 F.2d 1308, 1312–13 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). Technically, the basis of the federal court's jurisdiction is immaterial; the relevant question is whether the source of the law applied was federal or state. Nonetheless, the typical diversity case involves the resolution of claims and defenses based only on state law, and hence serves as a useful example.

in future suits.[111] These rules not only reflect strong federal polices, but they also represent formal enactments founded on Congressional authority. Rule 13(a), for example, embodies the policy of consolidating in one suit the plaintiff's and defendant's related claims. Obviously, the desired result will not be fully realized if the noncomplying defendant can assert the omitted counterclaim in a subsequent suit. Likewise, a dismissal with prejudice would be largely ineffective if the plaintiff could renew his claims in another court. Aside from the rendering court's interest in having adequate authority effectively to conclude a controversy or extinguish an unasserted claim, the litigants, too, have a kindred incentive to ascertain the contours of finality. Unless the rendering court's judgment uniformly carries obligatory consequences in other courts, there will usually be no repose between the parties, at least until the statute of limitations raises an effective bar. Without a binding obligation to respect the preclusive consequences of the rendering court's judgment, other courts are free to measure the degree of their compliance by "comity" or some other flexible—and hence unpredictable—standard.[112] It may be that a discriminating analysis, on a case by case basis, will provide the most precise balance of state and federal interests. But in this context, "life is too short," or, to put the matter more directly, uniformity, predictability, and ease of administrability are too important to leave the matter adrift. The Federal Rules affecting judgments should be enforceable not only in the rendering court and other federal courts, but in all courts within the Union.

This is not to argue that the Federal Rules of Civil Procedure operate directly to dictate their res judicata consequences in other courts. Probably they do not and, under one view, could not, without running afoul of the Enabling Act.[113] It is to argue, however, that the Federal Rules, promulgated by the

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[111] FED R. CIV. P. 13(a) and 41(b). The rule governing class actions might also be included in the list of Federal Rules affecting the consequences of a judgment. Federal Rule of Civil Procedure 23 assumes that properly represented class members will be bound by the court's judgment except in the limited circumstances in which a class member can "opt out" of the action. *See* FED. R. CIV. P. 23(b) and (c); *see also* FED. R. CIV. P. 18 (joinder of claims), FED. R. CIV. P. 15 (pleading amendments), and FED. R. CIV. P. 12(b). There is a forceful discussion of the effect of the Federal Rules in Degnan, *supra* note 5, at 760–63.

[112] Further, as noted earlier, reliance interests extend beyond the parties to the members of the public, such as creditors, who can be practically affected by the res judicata consequences of a judgment. *See supra* notes 51–62 and accompanying text.

[113] *See* Burbank, *supra* note 3, at 771–75, 782–83, 795. Furthermore, the tendency of the Supreme Court to restrictively construe the rules, at least in a related context, is well known. *See* Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (FED. R. CIV. P. 3 does not determine when state statute of limitations is tolled in diversity case); Ragan v.

Supreme Court under statutory authority and buttressed by the imprimatur of Congressional review,[114] provide a fertile context for uniform enforcement through federal common law. The results of the scattered cases are generally consistent with this thesis, although the reasons said to underlie the obligatory effect of the Federal Rules may vary.[115] If federal common law is the driving force behind uniform adherence to preclusive consequences traceable to the Federal Rules of Civil Procedure, the characterization of a particular Rule as "substantive" or "procedural" is not a critical determination.[116] The effect of a Federal Rule on future suits, whether characterized as substantive or procedural, is projected into other courts as an enforceable feature of the federal judgment that was configured by it. The more difficult issues arise when no Federal Rule (or statute) is applicable and federal res judicata law, as judicially developed, differs from the law of judgments of the state in which the initial federal district court is held. This, at least, properly focuses the problem. A few federal courts have mistakenly concluded that the choice-of-law issue lies between federal res judicata as applied by the recognizing federal court and

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Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Palmer v. Hoffman, 318 U.S. 109 (1943) (FED. R. CIV. P. 8(c) does not control burden of persuasion with respect to affirmative defenses, but only pleading obligations).

[114] *See* the Rules Enabling Act, 28 U.S.C. § 2072 (1988), and the related provisions, 28 U.S.C. §§ 2073-74 (1988).

[115] *See, e.g.*, Shoup v. Bell & Howell Co., 872 F.2d 1178, 1179-80 (4th Cir. 1989) (federal law determines preclusive effect of prior federal judgment based on state law, including question of whether judgment was on the merits for purpose of Rule 41(b)); PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896-97 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983) (federal law determines effect of Rule 41(b) dismissal in diversity action); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) (federal, not state, law governs preclusive effect when diversity court enters Rule 41(b) dismissal); Horne v. Woolever, 163 N.E.2d 378 (Ohio 1959) (counterclaim), *cert. denied*, 362 U.S. 951 (1960); London v. Philadelphia, 194 A.2d 901, 902 (Pa. 1963) (counterclaim not asserted in federal action could not later be brought in state court). The very small number of cases dealing with the effect of not asserting a compulsory counterclaim is probably due to the fact that, in cases of doubt, the defendant will assert the counterclaim, even if it is finally deemed persuasive rather than compulsory. *See* FED. R. CIV. P. 13(b). For a discussion of the effect of the Federal Rules in the intersystem context, see 6 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 129-141 (2d ed. 1982) (counterclaim); 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789, at 238-68 (class actions) (2d ed. 1988); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, at 229-234 (1969) (dismissals); 18 WRIGHT ET AL., *supra* note 3, at 658-59. Professor Degnan's arguments in support of the preclusive effects generated by the Federal Rules of Civil Procedure are compelling, *see* Degnan, *supra* note 5, at 760-71, but do not fully resolve all of the difficulties. *See* Burbank, *supra* note 3, at 772-775, 782-83.

[116] *See* 28 U.S.C. § 2072(b); *see also* WRIGHT, *supra* note 106, at 531-32.

the law of judgments of the state where the recognizing court sits.[117] Not only does this approach overlook the real problem, but it also introduces uncertainty for the initial litigants, who will be apprenhensive that state law might be applicable in the second suit, but cannot be sure where that suit will be filed. The real choice is between federal law and that of the state of the rendering diversity court. The question is one of determining the proper role of federal judge-made res judicata rules in the face of conflicting state law.

Of course, the fact that the origin of federal res judicata law is decisional may, in the final analysis, be inconsequential. These judicial rules, like the Federal Rules themselves, embody federal policies affecting the process of litigation in federal courts. That they have no direct Congressional support may not be decisive, but it does counsel more careful attention to federalism concerns. When state and federal interests collide and Congress has not spoken, the judicial imposition of a uniform federal solution must be attended by caution. There is also the additional concern that if the consequences of a federal judgment are not controlled by state law, impermissible forum shopping will result.

There has been much speculation and scholarly commentary[118] about the application of *Erie Railroad Co.* v. *Tompkins*[119] to federal judgments that rest on state substantive law. The general argument favoring an *Erie* analysis is that state interests are compelling and, in the absence of Congressional action, the Rules of Decision Act[120] should apply. Obviously, from the litigant's standpoint, it is desirable that it be known in advance which law is controlling. That is why it is essential that the recognizing court look to the judgment court to determine what res judicata rules would govern a second suit in that forum. Of course, the need for certainty does not tell us which solution, state or federal, is preferable. What it does suggest is that an authoritative uniform

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[117] Bates v. Union Oil Co., 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1761 (1992); Costantini v. TransWorld Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982); Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948); Amader v. Johns-Manville Corp., 541 F. Supp. 1384, 1385 (E.D. Pa. 1982); Miller v. Johns-Manville Sales Corp., 538 F. Supp. 631, 632 (D. Kan. 1982); Metcalfe Bros., Inc. v. American Mut. Liab. Ins. Co., 484 F. Supp. 826, 828-29 (W.D. Va. 1980).

[118] *See, e.g.*, Burbank, *supra* note 3, at 747-62; Degnan, *supra* note 5, at 755-73. For a spirited debate between scholars known for their contributions to the field of res judicata, see Geoffrey C. Hazard, Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 643 (1985) and Stephen B. Burbank, *Afterwards: A Response to Professor Hazard and A Comment on Marrese*, 70 CORNELL L. REV. 659 (1985).

[119] 304 U.S. 64 (1938).

[120] 28 U.S.C. § 1652 (1988).

approach should be forged—if not by Congress then by the Supreme Court. Whatever the ultimate solution with respect to the choice-of-law problem, the present uncertainties should not be allowed to linger.[121]

Analysis can begin with claim preclusion. It is, of course, acknowledged at the outset that strong state policies underlie the creation (or abolishment) of causes of action. This is the core of state substantive law and the central thrust of the *Erie* decision requiring deference to state law. Likewise, there is a state interest—though surely a more modest one—in defining the scope of a cause of action by requiring that grounds of recovery ("claims") be consolidated or, alternatively, permitting them to be split. Thus, courts favoring consolidation, such as federal courts and most state courts, use a transactional test that calls for the assertion of all theories of recovery (and all defenses) applicable to an event or series of closely related events.[122] Other courts use various means to define more narrowly a particular cause of action,[123] thus permitting "claims" to be split into more than one suit. To particularize the context, suppose, in a federal diversity suit filed in a state that allows separate personal injury and property damages claims based on the same event, the plaintiff initially asserts only the latter. In a subsequent suit in a federal or state court, he brings his claim for personal injury. The claim preclusion issue is thus framed: is the effect of the federal judgment governed by federal or state law?

Note that the application of federal claim preclusion rules will usually operate to force the consolidation of grounds of recovery that *could* be combined in state court but in some states, at least, could also be split.[124] Thus,

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[121] The federal courts are split on the issue of whether federal or state law controls the res judicata effects of a diversity judgment. *Compare, e.g., In Re* Air Crash at Dallas/Fort Worth, 861 F.2d 814, 816 (5th Cir. 1988) (federal law) *and* Silcox v. United Trucking Serv., 687 F.2d 848, 852 (6th Cir. 1982) (federal law) *with* Lane v. Sullivan, 900 F.2d 1247, 1249–50 (8th Cir.), *cert. denied*, 111 S. Ct. 134 (1990) (state law) *and* Federal Ins. Co. v. Gates Learjet Corp., 823 F.2d 383, 386 & n.1 (10th Cir. 1987) (using state law, when particular aspect of res judicata found "substantive"). *See* Burbank, *supra* note 3, at 778–80. Ample cases are collected in 18 WRIGHT ET AL., *supra* note 3, at 725–40 & Supp. 1992, 483–92.

[122] *See supra* note 33.

[123] *See* FRIEDENTHAL ET AL., *supra* note 2, at 619–27.

[124] *See, e.g.*, State Farm Mut. Auto Ins. Co. v. Davis, 176 Cal. Rptr. 517, 520 (Cal. Ct. App. 1981); Stephan v. Yellow Cab Co., 333 N.E.2d 223 (Ill. App. Ct. 1975); Gaul v. Tourtellette, 488 P.2d 416, 418 (Or. 1971); Carter v. Hinkle, 52 S.E.2d 135, 140 (Va. 1949); *see also* FRIEDENTHAL ET AL., *supra* note 2, at 313 ("[C]laims for divergent areas of substantive law . . . generally may be processed in the same action if they are sufficiently related so that their joint adjudication would promote judicial efficiency without sacrificing standards of justice."); JAMES & HAZARD, CIVIL PROCEDURE 467–68 (3d ed. 1985).

the plaintiff contemplating suit in a jurisdiction that allows severance will have at least three options: consolidation in state court; consolidation in federal court; or the assertion of one claim or ground of recovery in state court. Although the invocation of federal jurisdiction may exact a cost as the price of perceived efficiency (mandatory consolidation on pain of loss), it is difficult to conclude that the invasion of state interests is significant enough to overcome the federal interests in defining the scope of its own judgment. As the rendering court, the federal tribunal has an interest in prescribing the bounds of the controversy (a task in which claim preclusion is an important tool) and in determining what claims, issues, and parties are precluded by its judgment. The countervailing state policies are not likely to weigh as heavily. Perhaps the state's policy in permitting, for example, a separate property suit is to allow the injured plaintiff an early recovery for property loss while postponing his personal injury claim until the extent of his harm can be more certainly determined. A more likely explanation is that the state's rule is founded on the conceptual ground that the defendant's alleged conduct violated two "rights," one of the person, the other of property.[125] In either event, in the narrow context presently before us, it is hard to see how the state's policies are significantly eroded if the plaintiff chooses to bring suit in federal court and thus is under pressure to aggregate his claims. Again, the interests favoring a tribunal's right to define the effects of its own judgment—interests that surface frequently in this article—appear paramount. If these are the dominant interests, the application of the federal "transactional" test to state claims should be supported by federal common law, especially if the invasion of state interests is minimal. Even if *Erie* applied, there is solid support for a federal solution. Although *Byrd* v. *Blue Ridge Rural Electric Cooperatives, Inc.*[126] is not without its ambiguities, in the present context it lends itself to the argument that

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[125] *See* FRIEDENTHAL ET AL., *supra* note 2, at 623–24.

[126] 356 U.S. 525 (1958). "What emerges from Byrd is a balancing test that requires weighing the policies underlying the respective federal and state rules." FRIEDENTHAL ET AL., *supra* note 2, at 201. Whether a claim is broadly or narrowly defined does not appear to be closely bound to substantive rights. One still recovers for all injuries sustained, whether by asserting one claim or two. Put otherwise, the scope of a claim does not significantly bear on primary conduct, but rather is a form or mode of enforcement. Thus, *Byrd* would permit the court to take into account countervailing federal considerations. Note, also, that unlike the patterns that typically are governed by state law under *Erie*, the plaintiff has considerable control over the res judicata outcome, which he exercises *not simply* by selecting a federal or state forum, but by drafting the pleadings he files in the court he selects. For a careful analysis of the *Byrd* opinion, see TEPLY & WHITTEN, *supra* note 14, at 321–31.

countervailing considerations support a federal rule.[127] *Erie* has never demanded that a federal diversity court must achieve the precise litigating consequences that would obtain in its state counterpart. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence complete the story of a federal court's independence. Judge-made rules pertaining to the standards governing summary judgment, directed verdicts, new trials, and the admissibility of evidence can profoundly affect the outcome of a trial. That a future court may apply the federal law of claim preclusion to a suit involving the initial litigants does not appear illegitimate in light of this tradition.

In the broader context of preclusion generally, a distinction should be made between state rules that typically apply in federal court under *Erie* (roughly speaking, state substantive laws or laws closely bound to substantive concerns) and the laws of res judicata. Obviously, the former are applicable during the course of a federal diversity suit (or in the exercise of pendent jurisdiction), while the latter are triggered by the entry of a federal judgment. It is also true that the rules of res judicata have both procedural and substantive aspects, a feature that nourishes the protracted debate about preclusion in an inter-jurisdictional setting. But to acknowledge the dual qualities of the law of judgments does not, and should not, mean that balance struck in the *Erie* line of decisions is the appropriate divide for the application of federal res judicata. A critical event—the entry of judgment by an arm of the federal sovereign—provides the dominant federal interest, even in the diversity context. It is the protection and vindication of this federal feature of the litigation that justifies the application of federal common law.

It is interesting that in the large body of choice of law rules that have developed between the states, one searches in vain for a corpus of conflicts law dealing with a forum court's application of the preclusion rules of a "foreign" jurisdiction.[128] That is because the rendering court routinely applies its own

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[127] The *Byrd* decision has been intermittently invoked, in various res judicata contexts, to support the application of the federal law of judgments. *See, e.g.*, Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1496 (D.C. Cir. 1983); Aerojet-General Corp. v. Askew, 511 F.2d 710, 718 (5th Cir. 1975); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962). Because the *Byrd* opinion lends itself to alternative interpretations and in any event is narrowly drawn, most modern decisions rely on federal common law as the appropriate source of federal independence. *See supra* note 97. For additional commentary on the application of *Byrd* to the law of judgments, see Burbank, *supra* note 3, at 788–89; Mark G. Emerson, Note, *Res Judicata in the Federal Courts: Federal or State Law?*, 17 IND. L. REV. 523, 540–50 (1984).

[128] The suggestion has been made that "[t]here may be cases in which the courts of the rendering state would choose to apply the preclusion law of another state. . . ." Burbank,

rules of res judicata, even if it applied the substantive law of a sister state. And no one has seriously argued that, at least in most circumstances, a rendering state court should apply the res judicata law of a sister state. Under any choice-of-law theory, from the First Restatement to interest analysis, the res judicata law to be applied is ordinarily that of the judgment court. In the state-to-federal setting, of course, the full faith and credit statute dictates the application by the recognizing court of the law that would be applied by the rendering court—nearly always its own.[129] And while it is true that federalism concerns loom larger where a federal (diversity) court is the rendering court, the orthodox approach should prevail: the law of judgments should not be linked to the applicable substantive law. Regardless of what substantive law, federal or state, controlled the claims and defenses in the suit, federal law should control the effects of a federal judgment. Perhaps *Erie* is not irrelevant, as has sometimes been argued, but *Erie* concerns should give way to the prerogatives of the judgment court, secured by the force of federal common law.

When the present thesis is carried into the issue preclusion context, a federal outcome is again indicated. The federal law of judgments generally allows nonmutual preclusion,[130] while some states continue to adhere, at least to a degree, to the doctrines of mutuality.[131] Thus, a state citizen might be sued

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supra note 118, at 799. But, the author adds, "[t]his is not an assertion that any state has so acted. . . ." *Id.* at 799 n.327.

[129] The full-faith-and-credit statute calls for the "same full faith" that the judgment of the rendering court would "have by law and usage in the courts" of the rendering state. 28 U.S.C. § 1738 (1988). On its face, at least, this formulation does not refer exclusively to the res judicata law of the rendering state, but rather appears to be broad enough to include the res judicata law that would be applied by the rendering state, even if another sovereign were the source of that law. Burbank, *supra* note 118, at 798–99. But in the absence of controlling federal law, state courts routinely apply domestic doctrines of res judicata to their judgments. *See supra* note 114 and accompanying text.

[130] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories v. University of Illinois Found., 402 U.S. 313 (1971).

[131] FRIEDENTHAL ET AL., *supra* note 2, at 687–90; Shreve, *supra* note 3, at 1257. Note the complexity that arises if the state law of judgments controls the issue preclusive effects of determinations made in connection with the application of state substantive law (the "*Erie* approach"), but the federal law of judgments controls the issue preclusive effects of determinations made in connection with the application of federal substantive law. Many federal cases involve the application of both federal and state substantive law. *See supra* note 96. Quite commonly, a particular determination will be necessary, for example, to both a federal and state ground of recovery. Suppose, then, a determination of fact or law is material to both a federal claim (or defense) and also to a state claim (or defense). Suppose, further, that the federal law of res judicata allows nonmutual preclusion, but state law forbids it. Should f-2 use the federal rule or the state rule as to the common determination?

in a federal diversity court and subsequently be subjected to nonmutual issue preclusion that would not have been available had he first been sued in a state court. One response to this incongruence is to put the question whether in a federal suit involving diverse citizens, the interest of the host state is strong enough to bind all of the litigants to its law of res judicata. That seems quite a different question from asking whether the presence of diversity jurisdiction should defeat a state's interest in the application of its substantive rules governing primary conduct. In the latter instance, *Erie* provides, of course, a clear answer.

It is nonetheless apparent that the application of federal res judicata to judgments founded on state law will lead to "forum shopping" between state and federal courts in the sense that litigants and nonparties with similar claims may pursue court selection "strategies" designed to maximize success. Where differences exist between federal and state res judicata doctrines, plaintiffs will choose the most advantageous forum. Perhaps it is significant that *Erie* foreclosed the opportunity to shop for a forum that offered advantageous legal rules in the pending contest. In contrast, forum shopping by plaintiffs (and defendants, through removal) for more attractive res judicata rules reflect a strategy with respect to future suits. This difference may be beside the point, but it highlights the fact that it is the scope of the federal (or state) judgment and not the applicable law governing the claims and defenses that accounts for the forum selection. And, of course, in the successive suit there will be no reason to forum shop. The successor court, whether state or federal, should be required to look back to the initial federal forum for its res judicata guidance.

The question, then, is whether the initial selection of a federal (or state) court for its differing res judicata consequences is so incompatible with *Erie*'s policy discouraging forum shopping that the creation of federal common law is not justified. Even in this context, the controlling interests lie with the rendering federal court—namely, resource allocation and the legitimate need to define the scope of its judicial settlement.[132] In the final analysis then, one must find within the interstices of Article III, national authority to define the boundaries of a "case or controversy." It then seems quite appropriate for federal courts, even in the absence of Congressional action, to give concrete form to federal judgments. The Rules of Decision Act,[133] and hence *Erie*, no longer control. State law does not apply because the Constitution "otherwise requires."[134]

This difficult question is resolved if a federal judgment (regardless of the underlying substantive law) is a sufficient justification for applying the federal law of res judicata.

[132] *See supra* notes 83–97 and accompanying text.

[133] 28 U.S.C. § 1652 (1988).

[134] *Id.*

VI. CONCLUSION

So much scholarly ink has fallen on the present subject that one addresses it with diffidence, if not trepidation. It seems increasingly apparent that no single approach to intersystem preclusion is entirely satisfactory, for res judicata even within one jurisdiction serves variant ends. Its application to intersystem judgments kindles additional conflicts, increasing the inevitable trade-offs. Part of the problem is that doctrines of res judicata have both procedural and substantive qualities. That these doctrines are trans-substantive adds yet another layer of difficulty. The task is to discern the preferable solution, taking into account federal and state interests, problems of administrability, and the role of res judicata in litigation strategy.

The present Article emphasizes the importance of uniformity and its associated attribute, predictability. Stress is also laid on the posture—perhaps "predicament" is more apt—of litigants in an interjurisdictional setting and on the impact of their probable strategies in the judgment court. Finally, the present work carries forward the emphasis given by many other commentators to the special prerogatives of the rendering court—any rendering court—in controlling the effects of its judgments.

Two principles, already widely observed, must gain full recognition before there is a symmetrical approach to intersystem res judicata. The first directs that any court, state or federal, seeking to determine the effects of a judgment should routinely refer to the law of judgments of the rendering court. The second holds that the interests of the rendering court combine with those of the original litigants (and nonparties with a stake in the litigation) to give that court broad authority to determine the consequences of its judgment. These principles hold whether or not the full faith and credit statute is applicable. Differing views of the first and second forums as to the appropriate principles or rules of res judicata should not justify a departure from the law of the judgment court. Generally speaking, conformity to the effects prescribed by the first forum, whether state or federal, is required unless its judgment is invalid under the Constitution (or its own laws) or unless, in the case of a state court, its res judicata rules conflict with national policy. The rule can be changed if Congress so wishes or if, in "the light of reason and experience"[135] the federal common law is adapted to reflect different values and conditions. That this is,

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[135] The quoted phrase, often said to be the standard by which federal decisional law evolves, may be found, among other places, in FED. R. EVID. 501.

or at least ought to be, the rule means only that, under present conditions, it seems to be the most attractive alternative.